Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCvC)(A)-693–03 OF 2018
ABDUL RAHMAN SEBLI, MARY LIM AND HASNAH HASHIM JJCA
9 JANUARY 2020

Arbitration — Award — Jurisdiction of High Court — Appellant filed originating summons to set aside arbitration award — Respondent filed application to strike out originating summons — High Court allowed striking out application — Curial law — Whether High Court of Sabah and Sarawak had jurisdiction to consider originating summons to set aside arbitration award — Whether there was a need to establish jurisdiction under one of the limbs as provided under s 23 of the Courts of Judicature Act 1964 — Whether Kota Kinabalu High Court had jurisdiction to consider and decide the originating summons — Whether learned judge erred in taking into consideration the issue of juridical seat — Arbitration Act 2005 ss 2, 3, 37(1)(a)(v) & 37(2)(b) — Courts of Judicature Act 1964 s 23 — Rules of Court 2012 O 18 r 19(1)(a)

The appellant had filed an originating summons ('the OS') pursuant to s 37(1)(a)(v) and/or 37(2)(b) of the Arbitration Act 2005 ('the AA 2005') to vary and/or set aside in whole or in part the arbitration award dated 12 October 2017 made in favour of the respondent. In response, the respondent had filed an application to strike out the OS under O 18 r 19(1)(a) of the Rules of Court 2012 on the grounds that the High Court sitting in Kuala Lumpur was the supervisory court in respect of the arbitration and that the Kota Kinabalu High Court had no jurisdiction as the seat was in Kuala Lumpur and the cause of action arose in Kuala Lumpur. The respondent's application was allowed by the High Court, hence, the present appeal. The issues for consideration were whether the High Court of Sabah and Sarawak had jurisdiction to consider the OS to set aside the arbitration award and whether there was a need to establish jurisdiction under one of the limbs as provided under s 23 of the Courts of Judicature Act 1964 ('the CJA').

Held, allowing the appeal, and setting aside the order of the High Court with costs of RM15,000 to the appellant subject to payment of allocator:

(1) The appellant's cause of action related to the arbitration award. The locality of the issuance of the award in Kuala Lumpur was of no consequence as to where the cause of action arose. Section 23(1) of the CJA provided so long as any one of the four prescribed conditions either arose or occurred within its territory that High Court had jurisdiction or

was competent to try the civil proceedings. Under the CJA the High Court at Kota Kinabalu was competent to hear any matters related to the award (see para 24).

(2) The learned judge took the wrong approach in arriving at his conclusion in deciding to strike out the OS for lack of jurisdiction. The learned High Court judge had determined the juridical seat without taking into consideration that the determination of juridical seat was irrelevant in this case; it being a domestic arbitration the curial law was the AA 2005 applicable throughout Malaysia, peninsular Malaysia and the states of Sabah and Sarawak (see para 34).

(3) Since there was a single curial law for Malaysia and that both the High Court in Malaya and the High Court in Sabah and Sarawak were supervisory courts (see ss 2 and 3 of the AA 2005), the Kota Kinabalu High Court was certainly seized with the jurisdiction to consider and decide the OS to challenge the arbitration award (see para 37).

[Bahasa Malaysia summary

Perayu telah memfailkan saman pemula ('SP') menurut s 37(1)(a)(v) dan/atau 37(2)(b) Akta Timbang Tara 2005 ('AT 2005') untuk mengubah dan/atau mengenepikan secara keseluruhan atau sebahagian daripada award timbang tara bertarikh 12 Oktober 2017 yang memihak kepada responden. Bertindak balas daripada tindakan tersebut, responden telah memfailkan permohonan untuk membatalkan SP di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012 dengan alasan bahawa Mahkamah Tinggi Kuala Lumpur adalah mahkamah penyelia berkenaan dengan timbang tara dan bahawa Mahkamah Tinggi Kota Kinabalu tidak mempunyai bidang kuasa kerana kerusi persidangan berada di Kuala Lumpur dan kausa tindakan timbul di Kuala Lumpur. Permohonan responden dibenarkan oleh Mahkamah Tinggi, oleh itu, rayuan semasa. Isu-isu yang perlu dipertimbangkan adalah sama ada Mahkamah Tinggi Sabah dan Sarawak mempunyai bidang kuasa untuk mempertimbangkan SP untuk mengenepikan award timbang tara dan sama terdapat keperluan untuk menetapkan bidang kuasa di bawah salah satu bahagian yang dinyatakan di bawah s 23 Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan, rayuan dibenarkan dan perintah Mahkamah Tinggi diketepikan dengan kos RM15,000 diberikan kepada perayu tertakluk kepada bayaran alokator.

(1) Kausa tindakan perayu adalah berkaitan dengan award timbang tara. Kawasan award dikeluarkan iaitu di Kuala Lumpur tidak memberi kesan ke atas tempat di mana kausa tindakan timbul. Seksyen 23(1) AMK memperuntukkan bahawa selagi mana salah satu daripada empat syarat yang ditetapkan timbul atau terjadi di kawasannya, Mahkamah Tinggi

tersebut mempunyai bidang kuasa atau berkompeten untuk mengadili prosiding sivil tersebut. Di bawah AMK, Mahkamah Tinggi di Kota Kinabalu berkompeten untuk mendengar segala perkara yang berkaitan dengan award tersebut (lihat perenggan 24).

(2) Hakim yang bijaksana mengambil pendekatan yang salah dalam membuat kesimpulan dalam memutuskan untuk membatalkan SP kerana tidak mempunyai bidang kuasa. Hakim Mahkamah Tinggi yang bijaksana telah menentukan 'juridical seat' tanpa mempertimbangkan bahawa penentuan 'juridical seat' adalah tidak relevan dalam kes ini; sebagai timbang tara domestik, undang-undang yang mengawal selia adalah AT 2005 yang terpakai di seluruh Malaysia marangkumi semenanjung Malaysia, Sabah dan Sarawak (lihat perenggan 34).

(3) Oleh kerana terdapat satu sahaja 'curial law' untuk Malaysia dan Mahkamah Tinggi Malaya dan Mahkamah Tinggi di Sabah dan Sarawak adalah mahkamah penyelia (lihat ss 2 dan 3 AT 2005), Mahkamah Tinggi Kota Kinabalu tentunya mempunyai bidang kuasa untuk mempertimbangkan dan memutuskan SP untuk mencabar keputusan timbang tara (lihat perenggan 37).]

Cases referred to

C v D [2008] 1 All ER (Comm) 1001; [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239, CA (refd)

Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others [1993] 1 All ER 664; [1993] AC 334, HL (refd)

Distillers Co (Bio-Chemicals) Ltd v Thompson (by her next friend Arthur Leslie Thompson) [1971] 1 All ER 694; [1971] AC 458, PC (refd)

Government of India v Petrocon India Ltd [2016] 3 MLJ 435; [2016] 6 CLJ 321, FC (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63; [1988] 1 CLJ 219, SC (refd)

Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd) [2008] 8 MLJ 471, HC (refd)

Shashoua and others v Sharma [2009] 2 All ER (Comm) 477, QBD (refd)

Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (refd)

The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2012] 3 CLJ 423, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 2, 3, 37, 37(1)(a)(v), (2)(b), 42, Parts I, II, III, IV

Courts of Judicature Act 1964 s 23, 23(1)(a)

Rules of Court 2012 O 18 r 19(1)(a)

Appeal from: Originating Summons No BKI-24NCC(ARB)-1/11 of 2017 (HC1) (High Court, Kota Kinabalu)

Baldev Singh (Lawrence Thein and Daryl Wong with him) (Lim Guan Sing & Co) for the appellant.
Ronny Cham (Ronny Cham & Co) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This appeal by the appellant is against the decision of the High Court which had allowed the respondent's application to strike out the appellant's originating summons to challenge the arbitration award dated 12 October 2017. After having heard and considered the submission of the respective counsel for the parties, we had allowed the appeal. We now give our reasons.

[2] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

MATERIAL FACTS

[3] The originating summons filed by the plaintiff is pursuant to s 37(1)(a)(v) and/or 37(2)(b) of the Arbitration Act 2005 ('the AA 2005') to vary and/or set aside in whole or in part the arbitration award made in favour of the defendant. The application by the defendant to strike out the originating summons is based on the main ground that the High Court sitting in Kuala Lumpur is the supervisory court in respect of the arbitration.

[4] The essential background facts are not in dispute. By a letter of award dated 21 September 2012 the plaintiff appointed the defendant as its main contractor to construct a four-storey technology and commercial centre in Penampang Sabah ('the ITTC project'). The contract price for the ITTC project was RM236,154,640.12. Disputes arose between the parties which subsequently led to the plaintiff on 31 October 2013 to issue a notice of arbitration to refer the dispute to arbitration. The notice of arbitration, inter alia, demanded the defendant to revert on the proposal of the arbitrator. On 21 May 2014 the defendant filed a suit against the plaintiff in the Kota Kinabalu High Court claiming, amongst others the principal sum of RM44,187,527.87 for breach of contract (Suit No BK1-22NCVC-42 of 2014). However, by a notice of application dated 4 June 2014 filed by the plaintiff the suit was stayed pending the arbitration between the parties.

[5] The parties agreed that the arbitration be conducted at the Kuala Lumpur Regional Centre for Arbitration before a Kuala Lumpur based arbitrator. On 16 June 2014 Ar Boon Che Wee was appointed as the arbitrator

by Persatuan Arkitek Malaysia ('PAM') and that the arbitration to be conducted in accordance with the PAM Arbitration Rules ('PAM Rules'). The arbitration was conducted over a period of 27 days from 3 February–30 November 2016. At the conclusion of the arbitration, the arbitrator published his award on 12 October 2017 in favour of the defendant, dismissing the plaintiff's claim and allowing the defendant's counter claim for the sum of RM23,432,463.54. On 8 November 2017 the defendant commenced enforcement proceedings in the Kuala Lumpur High Court. The plaintiff then filed the originating summons at the High Court Kota Kinabalu to set aside the said award on 10 November 2017. This was then followed by an application by the defendant to transfer the proceedings from the Kota Kinabalu High Court to the Kuala Lumpur High Court.

[6] The defendant filed an application to strike out the originating summons on 29 December 2017 (encl 11). The application was premised on O 18 r 19(1)(a) of the Rules of Court 2012 ('the ROC') on the grounds that the Kuala Lumpur High Court is the supervisory court for the arbitration proceedings and that the Kota Kinabalu High Court has no jurisdiction as the seat is in Kuala Lumpur as well as the cause of action arose in Kuala Lumpur. The High Court judge sitting in the Kota Kinabalu High Court directed that the transfer and striking out applications be heard together.

[7] For ease of reference the applications filed by the parties in the Kuala Lumpur High Court and the Kota Kinabalu High Court are set out below:

Kuala Lumpur High Court	Kota Kinabalu High Court
The defendant filed an originating summons for the registration and enforcement of the award on 8 November 2017. On 27 November 2018 the High Court ordered that the award be recognised and enforced.	The plaintiff filed an originating summons to set aside the award on 10 November 2017.
On 12 April 2018 the plaintiff filed two applications: • application for stay of proceedings • application for refusal of recognition and enforcement of the award under s 39 of the AA 2005. Both applications dismissed on 16 October 2018 and 27 November 2018 respectively.	The defendant filed a notice of application dated 27 November 2017 to transfer the suit from Kota Kinabalu High Court to Kuala Lumpur High Court.

	The plaintiff filed application to strike out the originating summons. The High Court allowed this application on 23 March 2018.

THE HIGH COURT

[8] Before the High Court learned counsel for the defendant submitted that the parties had agreed to be bound by the PAM Rules. Rule 7 of the PAM Rules stipulates that the place of arbitration shall be the KLRCA. It also provides that the parties may choose the place of arbitration and in the event they could not reach an agreement the arbitrator will decide. It was further argued by learned counsel for the defendant that a provision expressly stipulating a venue of an arbitration does not amount to a choice of the seat of arbitration if there is no evidence that the parties agreed to choose another seat. In support the defendant referred to the case of *Shashoua and others v Sharma* [2009] 2 All ER (Comm) 477 where it was held by Cooke, J that London was the seat of the arbitration since there was an express designation of London as the venue, no alternative designation of a seat and the parties had adopted the ICC Rules. Thus, if parties have agreed that venue of arbitration is Kuala Lumpur it must be construed to mean the seat of arbitration as opposed to geographical place of arbitration. It therefore follows that since Kuala Lumpur is the seat of arbitration, the Kuala Lumpur High Court is undoubtedly the supervisory court over this arbitration. It is the submission of the defendant that the Kota Kinabalu High Court lacks jurisdiction to hear the Originating Summons to set aside the award.

[9] The plaintiff, in response, argued that s 23(1)(a) of the Courts of Judicature Act 1964 ('the CJA') would be applicable in this case and that the four limbs under the said section must be read disjunctively and, as long as one is met, the Kota Kinabalu High Court has jurisdiction. Furthermore, it was submitted that the dispute arose in Kota Kinabalu and the defendant's place of business is located in Kota Kinabalu. The plaintiff relied on the case of *Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)* [2008] 8 MLJ 471 where it was held that the plaintiff's cause of action is the right to enforce the award, the locality of the issuance of the award is of no consequence as to where the award arose.

[10] The learned High Court judge considered the arguments of both parties and struck out the originating summons granting an order in terms. The learned judge decided that since the seat of arbitration is Kuala Lumpur therefore the supervisory court is vested with jurisdiction to vary or set aside an

arbitration award. He found no merit in the argument of the plaintiff that the concept of place, venue or seat of arbitration has no relevance to domestic arbitration. The AA 2005 or the authorities does not make any distinction between domestic and international arbitration on the issue of the seat of arbitration.

OUR ANALYSIS AND DECISION

The law

[11] Against this background it seems to us the issues in this instant appeal is not in respect of the propriety of transfer of proceedings from the High Court of Sabah and Sarawak to the High Court of Malaya but whether the High Court of Sabah and Sarawak has jurisdiction to consider the originating summons to set aside the arbitration award and whether there is a need to establish jurisdiction under one of the limbs as provided under s 23 of the CJA.

[12] Before dealing with these issues, it is necessary to set out the essential statutory provisions and to summarise some of the applicable authority.

Authorities and relevant principles

[13] It is undisputed that the parties are bound by the *PAM Rules*. Article 7 of the Rules stipulates that the 'place' of arbitration shall be at the PAM Arbitration Centre located in Kuala Lumpur:

> 7.1 Place of Arbitration
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> The place of arbitration shall be at the PAM Arbitration Centre, but where the parties in viewing all the circumstances of the case are of the opinion that another place is more appropriate, then they may choose the place of arbitration that is the most convenient and failing agreement, the arbitrator shall decide on the place of arbitration.

[14] Section 2 of the AA 2005 defines 'High Court' as the High Court in Malaya or the High Court in Sabah and Sarawak or either of them:

> 'High Court' means the High Court in Malaya or the High Court in Sabah and Sarawak, as the case may require.

[15] In respect of a domestic arbitration, where the seat of arbitration is in Malaysia, Parts I, II and IV of the AA 2005 shall apply; and Part III only applies unless the parties agree in writing. Section 3 of the AA 2005 reads:

> (1) This Act shall apply throughout Malaysia.
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> (2) In respect of a domestic arbitration, where the seat of arbitration is in Malaysia —

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(a) Parts I, II and IV of this Act shall apply; and

(b) Part III of this Act shall apply unless the parties agree otherwise in writing ...

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[16] Part IV of AA 2005 amongst others, deals with the jurisdiction of arbitral tribunal, conduct of arbitral proceedings of award, termination of proceedings, recourse against award as well as recognition and enforcement of awards. Since the dispute is a domestic dispute the determination of juridical seat is irrelevant as there was no dispute that the curial law, that is the AA 2005

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applies throughout Malaysia.

[17] Sections 37 and 42 of the AA 2005 empower the High Court to set aside domestic awards. Section 37 of the AA 2005 reads:

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(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

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(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

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(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

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(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

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(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

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(ii) the award is in conflict with the public policy of Malaysia.

[18] Section 42 of the AA 2005 provides:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award:

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference:

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

[19] Section 23 of the CJA refers to the civil jurisdiction of the High Court and divides local jurisdiction into the High Court in Malaya and the High Court in Sabah and Sarawak:

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[20] In respect of s 23 of the CJA, the learned judge was of the view that the four limbs as stipulated under the said section was misapplied on the facts of this case and that it was inaccurate to say that the cause of action in respect of the originating summons arose in Kota Kinabalu as it was not about

A adjudication of a construction but an application to set aside an arbitration award. Accordingly, the learned judge opined that '... the 'cause of action' if such term were to be applied to the instant originating summons, is not about a claim in respect of the underlying construction dispute but it is about setting aside or varying the arbitration award in question'.

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[21] The High Court judge held that s 23 of the CJA is wholly inapplicable on the facts of the case since the seat of arbitration is Kuala Lumpur, the Kuala Lumpur High Court is vested with jurisdiction to vary or set aside an arbitration award. The relevant part of his judgment reads as follows:

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> [22] By virtue of the agreement between the parties and the choice of arbitrator, the parties completed the entire arbitration proceedings in Kuala Lumpur without any issue as to venue. In the premises, based on authorities that were cited by counsel for the defendant which I quoted earlier, the seat of arbitration is in Kuala Lumpur. It is trite law that the court that is vested with jurisdiction to vary or set aside an
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> D arbitration is the court of place of the seat of arbitration.

[22] David Wong Dak Wah J (as he then was) in *Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)* cited the case of *Government of Malaysia v*

E *Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63; [1988] 1 CLJ 219, where Tun Salleh Abbas explained what is meant by 'cause of action':

> 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB
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> F 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the
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> G appellant/defendant's act.

[23] In *Haip*'s case, David Wong Dak Wah J applied the above principle and held that the award itself does not give rise to a cause of action. The plaintiff's cause of action is the right to enforce the award and the locality of the issuance

H of the award is of no consequence as to where the cause of action arose. His Lordship was guided by the principle set out in the Privy Council in *Distillers Co (Bio-Chemicals) Ltd v Thompson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694; [1971] AC 458:

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> It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong. It is at any rate not wrongdoing in any country in the world to which the plaintiff (or the plaintiff's mother in a case such as this) may have happened to go before the damage 'occurred. It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to

occur. The right approach is, when the tort is complete, to look back over the series of events, constituting it and ask the question, where in substance did this cause of action arise? Theory no (iii) is that the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction. That is the rule laid down in *Jackson v Spittal* [1870] LR 5 CP 542, which is an authoritative case, and the rule is inherently reasonable, as the defendant is called upon to answer for his wrong in the courts of the country where he did the wrong.

[24] On the facts of the present case, we find there is much merit in the arguments of learned counsel for the plaintiff. The plaintiff's cause of action relates to the arbitration award. The locality of the issuance of the award in Kuala Lumpur is of no consequence as to where the cause of action arose. Section 23(1) of the CJA provides so long as any one of the four prescribed conditions either arose or occurred within its territory that High Court has jurisdiction or is competent to try the civil proceedings. Under the CJA the High Court at Kota Kinabalu is competent to hear any matters related to the award.

[25] Procedural law or curial law is the law governing the procedure to be adopted in an arbitration proceeding. More often than not the procedures may be different and dictated by the relevant institutional rules and only relevant in an arbitration with international element. The Federal Court in *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273 explained:

Governing law of the arbitration agreement: Under the model law, the arbitration agreement is separate from the contract itself. There could be separate governing laws governing the arbitration agreement and the contract itself (counsel cited *Government of India v Cairn Energy India Pty Ltd And Anor*). *Challenge is however decided by curial law*. Both case law and textbooks lean to the view that the law of the seat governs the arbitration agreement, because it is also the curial law. The mistake of the appellants was to ignore the curial law and to place no value on it. That could not be correct as the arbitration agreement must always be valid under the law of the seat. This principle is recognised in s 37(1)(a)(ii) of the AA 2005 which provides that an arbitration agreement must be valid under Malaysian law. There is an overriding presumption that in the absence of the parties expressly nominating the law governing the arbitration agreement, the *lex arbitrii* or the law of the seat shall be the governing law to prevent any contradiction for enforcement purposes between the *lex arbitrii* and the governing law of the arbitration agreement. (Emphasis added.)

[26] Arifin Zakaria CJ delivering the judgment of the court Federal Court in *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435; [2016] 6 CLJ 321 said:

(1) The seat of arbitration determines the curial law that will govern the arbitration proceedings. The seat refers to the legal seat rather than the geographical seat. It is a permanent or fixed seat which can only be changed by consent of parties to the arbitration and must be distinguished from the physical or geographical place where the arbitration was held. In the case of place of arbitration, it can be shifted from place to place without affecting the legal seat of the arbitration. (para 33)

(2) The term used in the arbitration clause in this case was 'venue' rather than 'seat'. The venue of arbitration as stated in art. 34.12 was Kuala Lumpur, Malaysia, while the law governing arbitration agreement was English law. In the absence of any provision for seat of arbitration as such, Kuala Lumpur which was named as the venue of arbitration, could be deemed to be the seat of the arbitration. If the word 'venue' in art. 34.12 was merely a reference to the geographical or physical seat, it would not have been necessary to have it inserted in the agreement because the geographical seat may be changed at any time at the convenience of the parties. Since the parties had expressly named Kuala Lumpur as the 'venue', the word 'venue' must be construed to mean 'seat'

[27] The English Court of Appeal in dismissing the appeal in *C v D* [2008] 1 All ER (Comm) 1001; [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239 held, inter alia, as follows:

(1) A choice of seat for arbitration had to be a choice of forum for remedies seeking to attack an arbitral award. By choosing London as the seat of arbitration, the parties had to be taken as having agreed that proceedings on the award were to be only those permitted by English law ... It could not have been intended by the parties that New York judicial remedies 7 MLJ 811 at 825 could also be permitted as that would be a recipe for litigation and confusion ... their agreements on the seat and the curial law necessarily meant that any challenge to any award had to be only those permitted by that Act (Arbitration Act 1996) ...

(2) ... In the instant case ... even if the arbitration clause itself were governed by New York law, it would not qualify as an 'agreement to the contrary', still less would it entitle the defendant to mount a challenge to the award in a country other than the seat of arbitration.

[28] Normally, the choice of curial law is made by identifying the seat of the arbitration. In *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] 1 All ER 664; [1993] AC 334 Lord Mustill explained that it is more common for the curial law of the arbitration to differ from the proper law of the substantive contract, as parties may agree to arbitrate in a country other than that whose law they have chosen to govern the agreement. In such a circumstances than it is for the proper law of the arbitration agreement to differ from the proper law of the substantive contract:

> It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the 'curial law' of the arbitration, as it is often called.

[29] Learned counsel for the defendant argued that when parties have agreed on the place or seat of arbitration the court must be slow to interfere with such agreement. In support learned counsel relied on the case of *Government of India v Petrocon India Ltd* where the Federal Court held as follows:

> [36] In the present case the venue of arbitration as stated in cl 34.12 being Kuala Lumpur, Malaysia, while the law governing arbitration agreement is English law. There is no provision for seat of arbitration as such. In the circumstances, could Kuala Lumpur which is named as the venue of arbitration be deemed to be the seat of the arbitration? We are of the view that there is a strong support for that proposition for the following reasons. Firstly, if the word 'venue' in cl 34.12 is merely a reference to the geographical or physical seat as held by the Court of Appeal, it would not have been necessary to have it inserted in the agreement because the geographical seat may be changed at any time at the convenience of the parties. Since the parties had expressly named Kuala Lumpur as the 'venue' we are inclined to the view that the word 'venue' in the present context must be construed to mean 'seat'.
>
> [37] Further, as stated earlier the word 'venue' or 'seat' is often used interchangeably in international arbitrations. In the present case, it was common ground that venue of the arbitration was first moved to Amsterdam from Kuala Lumpur due to the outbreak of SARS epidemic in Kuala Lumpur. Subsequently the hearings were shifted to London, culminating in the consent order of 15 November 2003, which shifted the seat of the arbitration to London. Therefore, at the start of the arbitration proceedings, Kuala Lumpur was commonly accepted as the seat of arbitration. This, couple with the filing.

[30] Much of the difficulty in this case, essentially stems from the interpretation and the application of the words 'venue' and 'seat'. The law of a place which arbitration is to be held is the 'seat' or 'forum' or 'locus arbiter'. The 'seat' must not be confused with 'venue', the geographical place chosen to conduct the arbitration proceedings agreed by the parties:

> Party autonomy in the choice of the law to govern arbitral procedure (the *lex arbitri*) is expressed in the choice of a seat for the arbitration. This 'seat' is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will be clear evidence that the parties (or the arbitrators, if so authorised by the parties) agreed to choose another seat for the arbitration; and that such choice will be effective to endow the

A courts of that country with jurisdiction to supervise and support the arbitration. The concept of the 'seat' of the arbitration is a juridical concept. The legal 'seat' must not be confused with the geographically convenient place chosen to conduct hearings.

B The courts of the seat will have the sole supervisory and primary supportive function in relation to the conduct of the arbitration, save where there has been an express and effective choice of a different *lex arbitri*, in which event the role of the court of the seat will be limited to those matters specified by their own law ...

C (see: paras 16–035 and 16–036, *Dicey, Morris & Collins: The Conflict of Law* (15th Ed, Sweet & Maxwell 2012, Vol 1).

[31] In *Petrocon* it was an international arbitration, governed by the law of the place which was the seat of arbitration. The question for determination by the Federal Court was whether the juridical seat of arbitration is a question of
D law dependent on the contract and its surrounding circumstances, whereas the venue of the arbitration is a matter of geographical convenience of the parties. It was observed by the Federal Court in *Petrocon* that the term used in the arbitration clause in the agreement was 'venue' and in international arbitrations, the words often used are 'place of arbitration', 'seat of arbitration'
E and 'forum'. The venue of arbitration was Kuala Lumpur, Malaysia, while the law governing the arbitration agreement is English law. The agreement unfortunately did not specify the seat of arbitration. The Federal Court held that the word 'venue' means the juridical seat of arbitration and not merely the
F geographical place of arbitration.

[32] In *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 at p 455; [2012] 3 CLJ 423 the Federal Court cited with approval the case of *C v D* [2008] 1 All ER (Comm) 1001; [2007] EWCA Civ 1282
G where Longmore LJ observed:

It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award. As the judge said in para 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of
H the 1996 Act. He added that their agreement on the seat and the 'curial law' necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v B* [2006] EWHC 2006 (Comm); [2007] 1 All ER (Comm) 591,; [2007] 1 Lloyd's Rep 237 and *A v B (No 2)* [2007] EWHC 54 (Comm); [2007] 1 All ER (Comm)
I 633; [2007] 1 Lloyd's Rep 358 in the first of which that learned judge said (para 111):

... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award

is agreed to be made only in the courts of the place designated as the seat of the arbitration. A

That is, in my view, a correct statement of the law ...

[33] The Federal Court in *Cairn Energy* made it clear on the effect of the choice of seat of arbitration: B

It is therefore clear that the English Court of Appeal clearly sets out that the curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. *Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards.* We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied. (Emphasis added.) C D

[34] In our view, the learned judge took the wrong approach in arriving at his conclusion in deciding to strike out the originating summons for lack of jurisdiction. The learned High Court judge had determined the juridical seat without taking into consideration that the determination of juridical seat is irrelevant in this case; it being a domestic arbitration the curial law is the AA 2005 applicable throughout Malaysia, peninsular Malaysia and the states of Sabah and Sarawak. E F

[35] The Federal Constitution has created two separate and independent High Court systems with concurrent powers and jurisdiction there is no reason why both the High Courts have jurisdiction as the supervisory court for the purpose of challenging the award. The concept of place, venue or seat of arbitration has no relevance to this arbitration as it is domestic arbitration. The determination of the juridical seat is necessary to determine the curial law of the country and in this appeal before us there is only one single curial law regulating the originating summons of the plaintiff. G

[36] Under the AA 2005 the plaintiff has a right to challenge the award by making the necessary applications provided under the law. When an application to challenge an award is made under it, it is prima facie the duty of the court to determine that challenge and to do so as promptly as possible to give effect to the arbitration award. The arbitration award before the High Court judge is not one with an international element but domestic in nature. H I

[37] In taking the approach that he did, we were of the view that the judge, with respect had erred. Since there is a single curial law for Malaysia and that both the High Court in Malaya and the High Court in Sabah and Sarawak are

supervisory courts (see ss 2 and 3 of the AA 2005), the Kota Kinabalu High Court is certainly seized with jurisdiction to consider and decide the originating summons to challenge the arbitration award.

CONCLUSION

[38] After having heard the parties at length and upon careful perusal of the records of appeals, we were of the considered opinion that appellate intervention was warranted. In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong.

[39] Accordingly, we allowed the appeal and set aside the order of the High Court with costs of RM15,000 to the appellant subject to payment of allocatur. As a necessary consequence of the appeal, we ordered that the originating summons (encl 1) be remitted to the High Court for the learned High Court judge to deal with encl 1.

Appeal allowed; order of High Court set aside with costs of RM15,000 to appellant subject to payment of allocator.

Reported by Dzulqarnain Ab Fatar